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Syahmie bin Hassan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05(M)-210–08 OF 2015
TENGKU MAIMUN, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
10 AUGUST 2017

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Criminal Procedure — Defence — Insanity — Whether medical diagnosis alone insufficient to sustain defence of insanity under s 84 of the Penal Code — Whether such diagnosis had to be well supported by factual findings that fulfilled requirements of s 84 — Whether fact accused suffering from bipolar disorder and history of slow learning ability, strange behaviour and depression insufficient itself to invalidate factual finding when he committed murder he displayed normal mental capacity — Whether accused's entire conduct from time he made preparations to kill deceased until time he made elaborate attempts to dispose of body and escape showed he not mentally unsound and knew what he doing was wrong or contrary to law — Whether circumstances of murder showed it pre-meditated

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Evidence — Adverse inference — Failure of prosecution to call witness — Accused in murder trial relied on defence of insanity under s 84 of the Penal Code — Prosecution did not call government psychiatrist who examined accused and certified that he was not of unsound mind when he committed the offence — Defence given prosecution prior notice that it intended to cross-examine the psychiatrist — Whether trial court should have invoked adverse inference against prosecution for not calling psychiatrist — Whether prosecution improper motive or attempted to suppress evidence — Whether psychiatrist's evidence supported prosecution's case but burden not on prosecution to show accused not of unsound mind but on accused to prove defence of insanity on balance of probabilities — Whether prosecution had absolute discretion to call which witness it wanted to prove its case — Whether court could not interfere with that discretion by invoking adverse inference when prosecution did not call any witness it felt not important to its case

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Around 1pm on 3 August 2011, the appellant ('the accused') — aged 20 years, the son of a policeman and a resident in an apartment block in Permai Lake View in Ulu Kinta, Ipoh, Perak — broke into and ransacked a neighbouring apartment on the first floor occupied by a 38-year-old woman ('Rohani') while she was not at home. The accused had done the same thing two weeks earlier together with his housemate, SP5, and Rohani had lodged a police report that

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her jewellery was missing. However, this time, the accused decided to wait in the apartment for Rohani to return at 6pm. The accused had brought with him a rope that he intended to use on her if she screamed. After Rohani returned, the accused initially hid behind a wardrobe and observed her movements but when she finally saw him she screamed and tried to escape. The accused jumped on her and tried to strangle her with the rope. In the ensuing struggle, Rohani fell, hit her head against a coffee table and became unconscious. While she was in that state, the accused strangled her, first with his bare hands, and then by using a curtain. He paused to see if she was still alive by checking her heart beat and whether there was any movement in her hands. He only stopped the strangling after being convinced that she was dead. The accused then returned to his house but came back later and had sexual intercourse with Rohani's dead body. He told SP5 what he had done, gave SP5 a gold bracelet he had taken from Rohani, and asked SP5 to help him roll up Rohani's body inside a mattress so that he could carry it down to her car and dispose of the body. However, while he was walking towards the car carrying the mattress with the body inside, a security guard at the apartment asked the accused what he was doing. The accused replied that he was taking an unknown woman to hospital, but when the guard asked why the woman's hands and legs were tied, the accused quickly put the mattress down and ran back up the stairs. The guard gave chase but lost sight of the accused when he entered one of the apartments. The guard contacted his supervisor and after they found Rohani dead, they called the police. Meanwhile, the accused had run to a restaurant near the apartment where he found his other housemate, SP6. He requested SP6 to send him to the bus station as he wanted to return to his hometown in Tanjung Malim. SP6 did as he was requested and bought the accused a ticket to come to Kuala Lumpur from where the accused took another bus to go to Tanjung Malim. On finding out what had happened, SP6 lodged a police report. The accused was arrested in Tanjung Malim later that day. The High Court convicted and sentenced the accused to death for killing Rohani after rejecting his defence of insanity under s 84 of the Penal Code and finding that the prosecution had proven its case beyond reasonable doubt. The accused remained silent when his defence was called but two witnesses testified on his behalf — a psychiatrist with a private hospital ('SD1') and the accused's father ('SD2'). SD2 was only able to say that the accused was a slow learner, that he had exhibited abnormal behaviour from time to time and that he had been treated for depression. SD1 testified that from his study of the accused, the latter might have been suffering from bipolar disorder. SD1 could not confirm what could have been the accused's state of mind when he committed the offence but said that 'by his planning and subsequent actions on that fateful day, it appeared that he ('the accused') was aware they would have resulted in the likely death of the victim'. A psychiatrist with a government hospital, Dr Swaran, had also examined the accused and certified that he was not of unsound mind when he committed the offence. The prosecution did not call Dr Swaran or adduce his reports in evidence although the defence had given

prior notice that it intended to cross-examine him. The trial court ruled, inter alia, that the non-calling of Dr Swaran neither adversely affected the prosecution's case nor helped the defence's case in proving the accused's state of mind at the material time because it was not the prosecution's duty to show that the accused was not of unsound mind but the accused's burden to prove his defence of insanity on balance of probabilities. The trial court held that it was wholly within the prosecution's discretion to call which witness it wanted in order to prove its case. The trial court rejected the insanity defence after finding that throughout the entire series of events that took place on the day in question, the accused had demonstrated the actions of a man who knew what he was doing; especially that what he was doing was wrong or contrary to law. In his instant appeal, the accused contended that the trial judge erred in not invoking adverse inference against the prosecution for failing to call Dr Swaran to testify and also in finding that the defence of insanity had not been proven on balance of probabilities.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) To invoke the adverse inference rule under s 114(g) of the Evidence Act 1950, there had to be a clear case of suppression of evidence. There was no basis whatsoever to hold that the prosecution's failure to call Dr Swaran amounted to an attempt by the prosecution to suppress his evidence. In fact, there was no reason for the prosecution to do so as his evidence was in its favour (see para 25).

(2) The decision not to call Dr Swaran was entirely within the prosecution's discretion to determine which witness it wanted to call to prove its case. There was no justification for the court to interfere with the exercise of that discretion by invoking adverse inference against the prosecution on its failure to call a witness who was not fundamental to its case. The prosecution decided that Dr Swaran's evidence was not necessary for it to prove its case and that decision was not without justification because it was not the prosecution's duty to exclude the defence of insanity relied upon by the appellant; rather, it was the appellant's burden to prove that defence under s 105 of the Evidence Act 1950 (see paras 26–27).

(3) The whole conduct of the appellant on the day of the incident, from the time he broke into the deceased's house up until his elaborate attempt to clear up the evidence and escape, were patently inconsistent with the acts of someone who was mentally unsound and incapable of knowing the nature and consequences of his acts. The appellant obviously knew that by breaking into the deceased's house and stealing her valuables, he was committing criminal acts and, as such, he was prepared to silence her from exposing his crime. That was his motive. He obviously knew that by strangling her, he would silence her and ensure that his crime would not be exposed. In the midst of strangling her, he even had the presence of

mind to check her heart beat and hand movement to make sure that she really was dead. He even came back later and stole more of her belongings and again had the presence of mind to take away a copy of her police report made after his previous break-in. Finally, by his attempt at disposing of the dead body and then running away after being caught red-handed by the security guards, he obviously knew what he did was contrary to law. Under such circumstances, the fact that he was diagnosed to be suffering from a certain mental illness coupled with histories of slow-learning ability, strange behaviour and depressive modes could not afford sufficient reasons to invalidate his apparently normal mental capacity at the time he committed the crime (see para 36).

(4) Though the appellant had a medically-recognised mental illness known as bipolar disorder, his conduct at all material times clearly defied the conduct of an insane person. On the contrary, it was consistent with the conduct of an intelligent person with a clear presence of mind. Worse, it was consistent with the conduct and mind of a hardened criminal who was prepared to kill to conceal his crime. On the totality of the evidence, the court was satisfied that at the time the offence was committed, the appellant was not laboring under any form of unsoundness of mind and he knew that the nature of what he did was against the law. It was, in fact, a pre-meditated murder (see para 37).

(5) Medical diagnosis alone was insufficient to sustain the defence of insanity under s 84 of the Penal Code. It had to be well supported by factual findings that fulfilled the requirements under s 84. To prove legal insanity as a complete defence under that section, the defence had to establish on balance of probabilities that at the time of committing the offence, the accused was of unsound mind and by reason of that unsoundness of mind he was incapable of knowing the nature of his act as being wrong or against the law. Although SD1 had diagnosed the appellant to be suffering from bipolar disorder, he never proposed that at the time of committing the offence, the appellant was incapable of knowing the nature of his acts. SD1's evidence was therefore inconclusive. The trial judge had applied the correct approach in determining whether the appellant had successfully proven the defence of insanity and did not commit any error in fact or in law that warranted appellate intervention. The conviction was safe and well supported by the evidence (see paras 30–31, 33–34 & 38).

[Bahasa Malaysia summary

Sekitar 1 petang pada 3 Ogos 2011, perayu ('tertuduh') — berumur 20 tahun, anak lelaki seorang polis dan penduduk blok apartmen di Permai Lake View di Ulu Kinta Ipoh, Perak — telah pecah masuk ke dalam dan menggeledah apartmen jiran di tingkat pertama yang didiami oleh wanita berumur 38 tahun ('Rohani') semasa dia tiada di rumah. Tertuduh telah melakukan perkara yang

sama dua minggu sebelumnya bersama teman serumahnya, SP5, dan Rohani telah membuat laporan polis bahawa barang kemasnya telah hilang. Walau bagaimanapun, kali ini, tertuduh membuat keputusan untuk menunggu di apartmen itu untuk Rohani pulang pada pukul 6 petang. Tertuduh telah membawa bersamanya tali yang dia bertujuan untuk digunakan padanya jika dia menjerit. Selepas Rohani pulang, tertuduh pada mulanya bersembunyi di belakang almari dan memperhatikan pergerakannya tetapi apabila akhirnya ternampak dia menjerit dan cuba melarikan diri. Tertuduh melompat ke arahnya dan cuba menjerutnya dengan tali itu. Semasa pergelutan berlaku, Rohani jatuh dan kepalanya terkena meja kopi dan tidak sedarkan diri. Semasa dia dalam keadaan itu, tertuduh telah mencekiknya, pertama dengan tangannya, dan kemudian dengan menggunakan langsir. Dia berhenti untuk melihat jika dia masih hidup dengan memeriksa nadinya dan sama ada terdapat apa-apa pergerakan pada tangannya. Dia hanya berhenti mencekik selepas yakin bahawa mangsa telah mati. Tertuduh kemudian pulang ke rumahnya tetapi datang semula kemudian dan melakukan hubungan seks dengan mayat Rohani. Dia memberitahu SP5 apa yang telah dilakukannya, memberi SP5 gelang tangan emas yang telah diambil daripada Rohani, dan memberitahu SP5 untuk membantunya menggulung mayat Rohani dalam tilam supaya dia boleh membawanya turun ke kereta si mati dan membuang mayat itu. Walau bagaimanapun, semasa dia berjalan menuju ke kereta dengan membawa tilam yang mempunyai mayat di dalamnya, penjaga keselamatan di apartmen itu bertanyakan tertuduh apa yang dilakukannya. Tertuduh menjawab bahawa dia membawa wanita yang tidak dikenali ke hospital, tetapi apabila penjaga keselamatan itu bertanyakan kenapa tangan dan kaki wanita itu diikat, tertuduh cepat-cepat meletakkan tilam itu ke bawah dan lari balik menaiki tangga. Penjaga keselamatan itu mengejarya tetapi tidak dapat apabila tertuduh memasuki salah satu apartmen itu. Penjaga keselamatan itu telah menghubungi penyelianya dan selepas mereka mendapati Rohani telah mati, mereka memanggil polis. Manakala, tertuduh telah lari ke sebuah restoran berdekatan apartmen itu di mana dia berjumpa dengan teman serumahnya yang lain, SP6. Dia meminta SP6 menghantarnya ke stesen bas untuk ke Tanjung Malim. Setelah mengetahui apa yang berlaku, SP6 telah membuat laporan polis. Tertuduh telah ditangkap di Tanjung Malim pada hari tersebut. Mahkamah Tinggi telah mensabit dan menjatuhkan hukuman mati ke atas tertuduh kerana membunuh Rohani selepas menolak pembelaan untuk tidak waras di bawah s 84 Kanun Keseksaan dan mendapati bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Tertuduh hanya berdiam diri semasa pembelaannya dipanggil tetapi dua saksi telah memberi keterangan bagi pihaknya — seorang pakar psikiatri dengan hospital swasta ('SD1') dan bapa tertuduh ('SD2'). SD2 hanya mampu untuk mengatakan bahawa tertuduh seorang yang lambat belajar, bahawa dia menunjukkan kelakuan tidak normal dari masa ke semasa dan bahawa dia telah dirawat kerana kemurungan. SD1 memberi keterangan berdasarkan kajiannya terhadap tertuduh, bahawa tertuduh mungkin mengalami gangguan bipolar.

A SD1 tidak boleh mengesahkan keadaan minda tertuduh sewaktu dia melakukan kesalahan itu tetapi mengatakan bahawa 'by his planning and subsequent actions on that fateful day, it appeared that he (the accused) was aware they would have resulted in the likely death of the victim'. Seorang pakar psikiatri dengan hospital kerajaan, Dr Swaran, juga telah memeriksa tertuduh B dan mengesahkan bahawa dia bukan tidak waras sewaktu melakukan kesalahan itu. Pendakwaan tidak memanggil Dr Swaran atau mengemukakan laporan keterangannya meskipun pembelaan telah memberikan notis terdahulu bahawa ia berniat untuk memeriksa balasnya. Mahkamah perbicaraan memutuskan, antara lain, bahawa dengan tidak memanggil C Dr Swaran ataupun tidak menjejaskan kes pendakwaan ataupun membantu kes pembelaan untuk membuktikan keadaan minda tertuduh pada masa matan kerana ia bukan kewajipan pendakwaan untuk menunjukkan bahawa tertuduh bukannya tidak waras tetapi beban bukti tertuduh untuk membuktikan pembelaannya untuk tidak waras atas imbangan D kebarangkalian. Mahkamah perbicaraan memutuskan bahawa ia adalah budi bicara pendakwaan secara keseluruhannya untuk memanggil saksi mana yang diingini bagi tujuan membuktikan kesnya. Mahkamah perbicaraan telah menolak pembelaan tidak waras selepas mendapati bahawa sepanjang keseluruhan siri kejadian yang berlaku pada hari yang dipersoalkan, tertuduh E telah menunjukkan tindakan seorang lelaki yang mengetahui apa yang dilakukannya; tertutamanya apa yang dilakukannya adalah salah atau bertentangan dengan undang-undang. Dalam rayuannya ini, tertuduh menegaskan bahawa hakim perbicaraan telah terkhilaf kerana tidak menggunakan inferens bertentangan terhadap pendakwaan kerana gagal F memanggil Dr Swaran untuk memberi keterangan dan juga mendapati bahawa pembelaan tidak waras tidak dapat dibuktikan atas imbangan kebarangkalian.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

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(1) Untuk menggunakan rukun inferens bertentangan di bawah s 114(g) Akta Keterangan 1950, perlu ada keterangan yang jelas disembunyikan. Tiada asas apa pun untuk memutuskan bahawa kegagalan pendakwaan untuk memanggil Dr Swaran merupakan percubaan oleh pendakwaan H untuk menyembunyikan keterangannya. Bahkan, tiada sebab untuk pendakwaan berbuat demikian kerana keterangannya menyebelahinya (lihat perenggan 25).

(2) Keputusan untuk tidak memanggil Dr Swaran terletak keseluruhannya pada budi bicara pendakwaan untuk menentukan saksi manakah yang I ingin dipanggilnya untuk membuktikan kesnya. Tiada justifikasi untuk mahkamah campur tangan dengan pelaksanaan budi bicara tersebut dengan menggunakan inferens bertentangan terhadap pendakwaan atas kegagalannya untuk memanggil saksi yang tidak penting kepada kesnya. Pendakwaan memutuskan bahawa keterangan Dr Swaran tidak perlu

untuknya membuktikan kesnya dan bahawa keputusan tersebut bukan tanpa justifikasi kerana ia bukan kewajipan pendakwaan untuk mengecualikan pembelaan tidak waras yang digunakan oleh perayu; malah, ia adalah beban perayu untuk membuktikan pembelaan tersebut di bawah s 105 Akta Keterangan 1950 (lihat perenggan 26–27).

(3) Keseluruhan perilaku perayu pada hari kejadian, dari masa dia pecah masuk ke dalam rumah si mati sehingga dia cuba menyembunyikan keterangan dan melarikan diri, jelas tidak konsisten dengan tindakan seseorang yang tidak waras mental dan tidak berupaya untuk mengetahui sifat dan akibat tindakannya. Perayu jelas mengetahui bahawa dengan memecah masuk ke dalam rumah si mati dan mencuri barangan berharganya, dia telah melakukan tindakan jenayah dan, oleh itu, dia bersedia untuk menutup mulut si mati daripada mendedahkan jenayahnya. Itu adalah motifnya. Perayu jelas mengetahui bahawa dengan mencekik si mati, dia akan melenyapkan dan memastikan bahawa jenayahnya tidak didedahkan. Semasa mencekik si mati, diperayu juga terfikir untuk memeriksa nadi dan pergerakan tangan si mati untuk memastikan bahawa dia memang telah mati. Malah perayu telah datang balik dan mencuri lagi barang milik si mati dan sekali lagi terfikir untuk mengambil salinan laporan polis yang dibuat oleh si mati selepas pecah masuk perayu sebelum itu. Akhirnya, dengan percubaan perayu untuk membuang mayat itu dan kemudian melarikan diri selepas disoal siasat oleh penjaga keselamatan itu, jelas dia mengetahui yang apa yang dilakukannya adalah bertentangan undang-undang. Di bawah keadaan sedemikian, fakta bahawa dia didapati mengalami sakit mental tertentu dan sejarah keupayaan belajar yang perlahan, berkelakuan pelik dan kemerungan tidak memberikan sebab mencukupi untuk menafikan keupayaan mentalnya yang kelihatan normal pada masa dia melakukan jenayah itu (lihat perenggan 36).

(4) Walaupun perayu mempunyai penyakit mental yang dikenali sebagai gangguan bipolar, perilakunya pada setiap masa matan jelas mencabar perilaku seorang yang tidak waras. Sebaliknya, ia tidak konsisten dengan perilaku seorang yang cerdik dengan keadaan minda yang waras. Lebih teruk lagi, ia adalah konsisten dengan perilaku dan minda penjenayah tegar yang bersedia untuk membunuh untuk menyembunyikan jenayahnya. Berdasarkan keseluruhan keterangan, mahkamah berpuas hati bahawa pada setiap masa kesalahan itu dilakukan, perayu bukan di bawah apa-apa bentuk minda yang tidak waras dan dia mengetahui bahawa sifat apa yang dilakukannya adalah bertentangan undang-undang. Ia adalah, pada hakikatnya, satu pembunuhan yang direncanakan (lihat perenggan 37).

(5) Diagnosis perubatan sahaja tidak mencukupi untuk mengekalkan pembelaan tidak waras di bawah s 84 Kanun Keseksaan. Ia telah

A disokong dengan dapatan faktual yang memenuhi keperluan di bawah s 84. Bagi membuktikan tidak waras dari segi undang-undang sebagai pembelaan lengkap di bawah seksyen tersebut, pembelaan itu perlu dibuktikan atas imbangan kebarangkalian bahawa pada masa melakukan kesalahan itu, tertuduh tidak waras dan oleh sebab keadaan tidak waras B itu dia tidak berupaya mengetahu sifat tindakannya adalah salah atau bertentangan undang-undang. Walaupun SD1 didiagnosis perayu sebagai mengalami gangguan bipolar, dia tidak mencadangkan pada masa melakukan kesalahan itu, perayu tidak berupaya mengetahui sifat tindakannya. Keterangan SD1 dengan itu tidak konklusif. Hakim C perbicaraan telah mengguna pakai pendekatan yang betul dalam menentukan sama ada perayu berjaya membuktikan pembelaan tidak waras dan tidak melakukan apa-apa kesilapan dari segi fakta atau undang-undang yang mewajarkan campur tangan perayu. Sabitan adalah D selamat dan disokong oleh keterangan (lihat perenggan 30–31, 33–34 & 38).]

Notes

For cases on defence of insanity, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) E paras 2285–2291.

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 413–433.

Cases referred to

F *John a/k Nyumbei v PP* [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)

Legislation referred to

Criminal Procedure Code ss 112, 399
Evidence Act 1950 ss 105, 114(g)
G Penal Code s 84

Appeal from: Criminal Trial No 45B-1–04 of 2012 (High Court, Ipoh)

Rafael Abdullah (Rafael Prabakaran & Co) for the appellant.
H *Wan Shaharudin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Ahmadi Asnawi JCA:

I **[1]** The appellant was preferred with the following charge before the High Court at Ipoh:

> Bahawa kamu pada 3.8.2011 di antara jam lebih kurang 6 petang hingga 7.30 malam, di alamat Blok F, Tingkat 1, Unit 9, Persiaran Lembah Perpaduan, Permai Lake View, Ulu Kinta, Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul

Ridzuan, telah melakukan pembunuhan dengan menyebabkan kematian ke atas ROHANI BINTI KASSIM K/P No 730407–08–6120, dan oleh yang demikian, kamu telah melakukan kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

[2] At the conclusion of the trial, the appellant was found guilty and convicted of the offence as charged and sentenced to suffer the death penalty.

[3] After examining the appeal records and considering the written and oral submissions of the parties, we unanimously found the appeal was bereft of merit and dismissed the same. We affirmed the conviction and sentence handed down by the High Court. We now give our grounds.

A SYNOPSIS OF THE TRIAL

[4] The case was heard before two High Court judges. The first judge was transferred having heard the evidence of nine witnesses for the prosecution. The second judge continued with the evidence of the prosecution's other 11 witnesses until the conclusion of the trial.

[5] The defence had made it clear from the outset of the trial that it would be relying on the defence of insanity pursuant to s 84 of the Penal Code. Learned counsel had informed the court that he had served a notice under s 399 of the Criminal Procedure Code ('the CPC') to the learned duty public prosecutor ('the learned DPP') for the cross-examination of one Dr Swaran from Hospital Ulu Kinta who was said to have prepared two psychiatric reports on the appellant. The said Dr Swaran was neither called as a witness nor his reports admitted in evidence.

[6] During the cross-examination of the prosecution's last witness ie the investigating officer, ASP Nirmala a/p Arumugam ('SP20'), the defence had applied for the admission of the appellant's statement recorded under s 112 of the Criminal Procedure Code ('exh D84'). It contained the appellant's confession and the gruesome details of the killing of the deceased by the appellant.

[7] Learned counsel in his submission at the end of the prosecution's case conceded that pursuant to s 105 of the Evidence Act 1950, the burden of proof was on the appellant to prove insanity pursuant to s 84 of the Penal Code on a balance of probabilities.

[8] At the end of the prosecution's case, the learned trial judge decided that a prima facie case of murder had been proven against the appellant and called him to enter his defence.

[9] Upon being called to enter his defence against the charge, the appellant chose to remain silent. The defence called two other witnesses ie a psychiatrist, Dr Prem Kumar Chandrasekaran ('SD1') and the appellant's father, Hassan bin Sarbini ('SD2').

[10] At the end of the defence case, the learned trial judge convicted the appellant of murder and sentenced him to death.

THE CASE FOR THE PROSECUTION

[11] On 4 August 2011 at about 3am, SP4 (Ahamad Bokhari bin Umar Baki), a security guard at Permai Lake View apartment in Ulu Kinta, Ipoh, had seen the appellant walking back and forth in front of Block F of the said apartment complex. SP4 became suspicious and kept his eye on him. SP4 then saw the appellant carrying a rolled-up mattress down the stairs from the first to ground floor. SP4, by now accompanied by his colleague, SP3 (Suresh a/l Subramaniam), went to approach the appellant. While on their way, SP3 stopped when someone greeted and talked to him. SP4 continued approaching the appellant and asked what he was carrying. The appellant said that he was taking an unknown woman to a hospital. SP4 noticed that the woman's hand and leg were tied and asked the appellant about it. Upon being further questioned by SP4, the appellant put the mattress down and fled upstairs. SP4 went after him and saw the appellant went inside one of the apartment unit at Block F. SP4 left to inform his supervisor, SP2 (Ismail bin Hamid) of what happened. They then inspected the mattress and found the deceased already dead within the rolled up mattress. The deceased was known to SP4 as about two weeks before that, she had made a report about her missing jewelry. SP2 called the police.

[12] SP5 (Nuur Hisyam bin Shukor) and SP6 (Calvin Siew) were the housemates of the appellant. According to SP5, on 3 August 2011 at about 8pm, the appellant came home and then gave him a gold bracelet and asked him to sell it. Later at about 1am the appellant went inside SP5's room and told him that the bracelet belonged to their lady neighbour and that he had killed her. The appellant then led SP5 to her unit and showed him her dead body. PW5 identified the dead body as that of the deceased.

[13] SP6 was at a restaurant near the apartment when the appellant suddenly appeared before him. It was already past 3am on 4 August 2011. The appellant asked SP6 to send him to a bus station as he wanted to go back to his hometown. Before going to the bus station, the appellant had asked SP6 to fetch SP5. SP6 called SP5 as to his whereabouts. They reached the bus station at about 4am. The appellant asked SP6 to buy him a bus ticket to Tanjung Malim, which SP6 did. On the way back from the bus station, SP5 revealed

what happened to SP6. SP6 insisted they made a police report but SP5 refused as he was a military absconder. SP6 then went alone to lodge a police report. The appellant was arrested at Tanjung Malim on 4 August 2011 at about 4.30pm.

[14] In exh D84 (at pp 677–687, *rekod rayuan*, *Jld* 5), the appellant gave insightful details of what had transpired before and after the killing. On 3 August 2011 at about 1pm he broke into and ransacked the deceased's house. He stayed there until she returned home at about 6pm. In the meantime, he had prepared a rope to be used against her, to stop her from screaming if necessary. When she entered her house, he hid behind a wardrobe and observed her movement. The deceased finally discovered him in her house. She screamed and tried to escape. He jumped on her and tried to strangle her using the rope. She bit off his fingers causing them to bleed. She then fell and knocked her head against a coffee table, making her unconscious. As she was lying unconscious, he proceeded to strangle her, at first by hand and then using a curtain, to ensure her death. He paused to check her heart beat and hand movement, to find out if she was still alive. He stopped when he was convinced that she was already dead. He then left her dead body and went back to his house. He came back later and had sexual intercourse with the dead body. He also described his encounter with the security guards while attempting to dispose of her dead body and how he made his escape, up until the time he was arrested by the police at Tanjung Malim. The appellant also related how he and SP5 had previously broken into the deceased's house on 14 July 2011.

[15] The pathologist, SP18 (Dr Mohd Shafie bin Othman @ Osman) confirmed that the deceased had been strangled to death.

[16] The appellant's DNA had been traced on the specimen of blood and semen and the nail clipping taken from the body of the deceased.

[17] At the end of the prosecution's case, the learned trial judge ruled that a, prima facie, case of murder had been proven against the appellant and called him to enter his defence.

THE CASE FOR THE DEFENCE

[18] The appellant had chosen to remain silent.

[19] SD1 was a psychiatrist at a private hospital. He had prepared a medical report on the appellant marked as exh D86. The report was based on his 90 minutes observation on the appellant when the appellant was remanded in prison, his conversation with his family members and his reading of a medical report obtained from Slim River Hospital marked as exh D87. He gave an

opinion that the appellant was suffering from a type of mental illness known as 'bipolar disorder' and at the time of the killing, the appellant was acting under the influence of his mental illness.

[20] SD2 gave evidence on what he thought as the appellant's slow learning ability and several incidences that indicated his abnormal behavior. He also testified that the appellant was treated for depression at Slim River Hospital in 2010, a report of which was marked as exh D87.

[21] At the end of the defence case, the learned trial judge ruled that the charge against the appellant had been proven beyond reasonable doubt and therefore convicted him as charged and sentenced him to death.

THE APPEAL

[22] The learned counsel raised two grounds of appeal as follows:

(a) failure of the learned trial judge to invoke an adverse inference against the prosecution for their failure to call Dr Swaran; and

(b) failure of the learned trial judge to find that the defence of insanity had been proven on a balance of probabilities.

The first ground — Failure of the learned trial judge to invoke an adverse inference against the prosecution for failure to call Dr Swaran

[23] The issue had been raised in the court below. The learned trial judge had deliberated on the issue as follows (at pp 41–42, *rekod rayuan, Jld* 1):

> [47] Akhirnya, penghujahan peguam OKT mengenai kegagalan pihak pendakwaan memanggil Dr Swaran Singh untuk disoal balas turut diberi pertimbangan. Dr Swaran dikatakan telah 2 kali membuat pemeriksaan dan pemerhatian ke atas OKT. Walaubagaimanapun pihak pendakwa tidak memanggilnya sebagai saksi. Laporan psikiatri Dr Swaran juga tidak dikemukakan. Pihak pembelaan telah mengemukakan notis di bawah s 399 KTJ untuk menyoal balas Dr Swaran. Di dalam hal ini, adalah didapati bahawa pihak pendakwaan tidak ada apa-apa tugas untuk membukti OKT tidak siuman. Berdasarkan kepada Nota Keterangan, perkara berkaitan dengan notis s 399 ke atas Dr Swaran telah ditimbulkan pihak pembelaan sejak dari awal prosiding lagi. Rekod prosiding juga menunjukkan sebelum SP5 memberi keterangan, TPR telah memaklumkan kepada mahkamah yang pihaknya tidak bercadang untuk memanggil Dr Swaran. Malah nama Dr Swaran tidak ada pun di dalam senarai saksi. Pihak pendakwaan berbuat demikian kerana laporan Dr Swaran mendapati OKT waras pada masa kesalahan dilakukan.
>
> [48] Undang-undang berkaitan pemanggilan saksi oleh pihak pendakwaan adalah mantap. Thompson CJ di dalam kes *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105 telah memutuskan:

> It is, of course, well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particular has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth.

Beliau juga telah merujuk kepada keputusan Lord Thankerton di dalam kes *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156 yang memutuskan:

> The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

Oleh itu kegagalan pihak pendakwa memanggil Dr Swaran tidak boleh dianggap sebagai kekurangan kepada pihak pendakwaan atau menjadi kelebihan kepada pihak pembelaan di dalam membuktikan keadaan mental OKT. Beban bagi membuktikan keadaan mental OKT terletak di bahu pihak pembelaan. Sekiranya didapati keterangan Dr Swaran boleh membantu membuktikan OKT tidak waras semasa kejadian, pihak pembelaan boleh pada bila-bila masa memanggil Dr Swaran menjadi saksi.

[24] Before us, learned counsel argued that the reasons why Dr Swaran was not called despite the notice under s 399 of the CPC being served were on account that:

(a) the prosecution does not believe nor trust his report;

(b) the prosecution does not believe that Dr Swaran will be able to withstand the test of cross-examination due to his shabby and lack of professionalism in carrying out his duties; and

(c) the prosecution believes that the appellant is in fact mentally unsound and therefore disagree with Dr Swaran.

[25] We have given the issue our utmost consideration and we find ourselves in full agreement with the learned trial judge. To invoke the adverse inference rule under s 114(g) of the Evidence Act 1950, there must be a clear case of suppression of evidence. We find no basis whatsoever to hold that the failure by the prosecution to call Dr Swaran would amount to an attempt by the prosecution to suppress his evidence. In fact, there was no reason for the prosecution to do so as his evidence, as pointed out by the learned trial judge, would be in favour of the prosecution.

[26] In our view, it has always been a matter within the absolute discretion of the prosecution to determine which witness to be called to prove its case, and in this case, it was the prosecution's sole business to determine that the evidence of Dr Swaran was not necessary for them to prove its case. Apparently, their decision was not without justification. As rightly pointed out by the learned

A trial judge, it was not the duty of the prosecution to exclude the defence of insanity relied upon by the appellant. The burden to prove the appellant's state of mind is absolutely upon the defence pursuant to s 105 of the Evidence Act 1950.

B **[27]** Therefore, we are of a view that the decision not to call Dr Swaran by the prosecution was entirely within the purview of its prosecutorial discretion and there was no justification for the court to interfere with that exercise of discretion by invoking an adverse inference against the prosecution for its failure to call the said witness which was not fundamental to its case.

C

The second ground — Failure of the learned trial judge to find that the defence of insanity had been proven on a balance of probabilities

D **[28]** The learned counsel submitted that the evidence adduced should be sufficient for the defence to prove insanity on a balance of probabilities. It was further argued that the learned trial judge had effectively placed a heavier burden upon the defence by failing to adequately consider the fact that the appellant had a history of depression and abnormal behavior, that the appellant E was suffering from a mental illness known as 'bipolar disorder' as shown by the diagnosis made by SD1, and that what the appellant had done on the day of the incident was not something that a normal person would ordinarily do.

[29] To encapsulate the law on the defence of insanity pursuant to s 84 of the F Penal Code, it should be sufficient for us to refer to the oft-quoted judgment of Abdul Hamid Embong JCA in *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206 at pp 211–213; [2007] 2 CLJ 509 at pp 516–518 as follows:

> 10. The law on unsoundness of mind as a complete defence in our criminal G jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s 84 of the Penal Code. It states:
>
> > 84 Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.
>
> H 11. This section exempts a person found to be insane of any criminal responsibility if it is found that he is 'incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law' (see commentary in *Ratanlal and Dirajlal's Law of Crimes,* 25th Ed, p 280). The learned authors there further commented that a person 'is not protected if he knew that what he was doing was wrong, even though I he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong'.
>
> 12. Thus, under s 84 of the Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.

13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, 25th Ed, p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

> It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *PP v Misbah bin Saat* [1997] 3 MLJ 495; [1998] 1 CLJ 759.

14. When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law. (see *Ratanlal and Dhirajlal's Law of Crimes*, 5th Ed, p 289 et seq).

15. It is also settled law that the burden of proof rests on the person who raises the defence of insanity (see *Juraimi bin Hussein v PP* [1998] 2 CLJ 383 also *Baharom v PP* [1960] 26 MLJ 249; [1960] 1 LNS 9). And it is only the accused person who has this right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see *PP v Misbah bin Saat).*

16. The standard of proof upon the accused raising the defence of insanity is on a balance of probabilities, as in a civil case (*Rajagopal v PP* [1977] 1 MLJ 6; [1976] 1 LNS 122, *Goh Yoke v PP* [1970] 1 MLJ 63; [1969] 1 LNS 48). So, if the appellant here is able to show, either from the prosecution or other evidence that he committed the crime but was at that time insane, he cannot be culpable by virtue of s 84 of the Penal Code.

[30] In our view, the learned trial judge had applied the correct approach in determining whether the defence had successfully proven a defence of insanity pursuant to s 84 of the Penal Code when His Lordship said as follows (at pp 30–31, *rekod rayuan, Jld* 1):

> [29] Undang-undang berkait dengan tahap beban bukti pembelaan ketidaksempurnaan akal adalah mantap. Pihak OKT perlu di atas imbangan kebarangkalian melepaskan beban bukti tersebut. Lihat keputusan kes-kes *Goh Yoke*

v PP [1970] 1 MLJ 63, *Rajagopal v Public Prosecutor* [1977] 1 MLJ 6 dan *Public Prosecutor v Nageswari.*

[30] Oleh itu, bagi membuktikan pembelaan di bawah s 84 KK, pihak pembelaan perlulah membuktikan:

(a) pada masa OKT melakukan perbuatan mendatangkan bencana tubuh yang menyebabkan kematian si mati;

(b) akal OKT tidak sempurna; dan

(c) OKT tidak mengetahui keadaan perbuatannya atau perbuatannya itu salah atau berlawanan dengan undang-undang.

Dengan lain perkataan, ketidaksempurnaan akal OKT hendaklah dibuktikan pada masa kesalahan dilakukan dan akibat dari ketidaksempurnaan akal tersebut, OKT tidak tahu keadaan perbuatannya dan OKT tidak tahu perbuatannya itu adalah salah di sisi undang-undang atau berlawanan dengan undang-undang.

[31] Therefore, to prove legal insanity as a complete defence pursuant to s 84 of the Penal Code, it must be firmly established by the defence, so as to tilt the balance of probabilities in its favour, that at the time of committing the offence, the appellant was of unsound mind; and by that reason of unsoundness of mind, he was incapable of knowing the nature of his act as being wrong or against the law.

[32] The appellant primarily relied on the evidence of SD1 that the appellant was suffering from a type of mental illness known as 'bipolar disorder'. These are the evidence of SD1 as contained in exh D86 (at pp 695–696, *rekod rayuan*, *Jld* 5). It merits its reproduction in extenso:

When I first assessed En Syahmie between 1540 and 1710 hours, I observed a 20 year-old well-built and muscular Malay man who was neat and tidy in appearance, in spite of being handcuffed. He had good eye contact but his gaze was cold, especially during a reaction to an anecdote about a cat getting hurt, where after he seemed angry momentarily. However, there appeared to be no hostility although he was initially guarded. He spoke relevantly but rarely answered to the point. His mood seemed normal and his affect was appropriate. There were no perceptual disturbances or disorder of thought content. There were no homicidal wishes and he seemed overly confident of getting out of prison after 15 years as his father is a cop — he seemed unaware of the possibility of a death sentence and if he indeed was, he seemed indifferent to it. Coupled with his questionable judgement, his level of intelligence seemed to be in doubt. He also had poor insight into the seriousness of the crime he committed.

Considering the above history and mental state examination ('MSE') findings, I feel that En Syahmie may not be suffering from an Antisocial Personality Disorder or an Other Specified Paraphilic Disorder (Necrophilia), coded 301.7 and 302.89 respectively in the Diagnostic & Statistical Manual of Mental Disorders ('DSM-V') as some bits from the history may suggest. Nor does a Substance-induced Bipolar and Related Disorder, coded F19.24 in the newer International Classification of

Diseases ('ICD-11'), loosely called a Bipolar III Disorder, seem likely, although his condition during the 2010 admission resembled Cannabis Intoxication, with Perceptual Disturbances, coded F12.22g (ICD coding is mentioned here merely because it is recommended for these categories).

Having said that, a Bipolar Disorder cannot be ruled out because of increased sex drive at time of the incident, overly happy periods at 17 years of age as noted by his eldest brother Hafizul, possible auditory hallucinations during the 2010 admission in Slim River Hospital and increased energy and restlessness when he stopped treatment thereafter, accompanied by a frank depressive spell while going out with his ex-girlfriend Hidayah, albeit the symptoms lasting for a week only, and finally, from observances by Hafizul of threatening behaviour while in detention in Kedah, as well as the observation of some degree of over-confidence by myself when he was seen in Taiping Prison.

Finally, in all fairness, he may on the other hand have some degree of Intellectual Disability, for the determination of which I had earlier requested an Intelligence Quotient ('IQ') test to be carried out but he had not been sent for the appointment made at Penang General Hospital with a clinical psychologist (he was also recommended to have an Electroencephalogram ('EEG') done for completion's sake to rule out any organicity but to the best of my knowledge, no arrangements had been made to facilitate that request). Hence, I am unable to confirm as to whether at the material time of committing the alleged offense on 3rd September 2012, he was indeed under the influence of poor judgement, which can be a concomitant of mental subnormaltiy. But notwithstanding, it can be assumed that by his planning and subsequent actions on that fateful day, it appears that he was aware they would have resulted in the likely death of the victim.

[33] As suggested by high authority, medical diagnosis alone would not be sufficient to sustain the defence of insanity under s 84 of the Penal Code. It must be well supported by factual findings that fulfilled the requirements under the section.

[34] Although SD1 had diagnosed the appellant to be suffering from 'bipolar disorder', he had never proposed that at the time of committing the offence, the appellant was incapable of knowing the nature of his acts. His evidence was therefore inconclusive.

[35] The learned trial judge, having considered the evidence of the appellant contained in his cautioned statement ('exh D84'), was not convinced that the appellant was legally insane when he committed the killing, for the following reasons (at pp 36–39, *rekod rayuan, Jld* 1):

[38] Dari keterangan yang ada, jelas menunjukkan niat OKT. Pada asalnya OKT memecah masuk ke rumah si mati hanyalah untuk mencuri. Kecewa dengan ketiadaan barang berharga, OKT tunggu dan buat persediaan untuk merompak si mati. Peralatan untuk mencekik jika si mati menjerit, menunjukkan niat OKT untuk mendatangkan bencana tubuh ke atas si mati. OKT sememangnya bersedia dengan peralatan untuk bertindak sekiranya perlu. Seseorang yang tidak waras pada

pandangan mahkamah tidak berupaya membuat persiapan sedemikian. Kesimpulan SD1 di perenggan terakhir laporan eksibit D86 jelas menyokong fakta tersebut. SD1 mengatakan:

> But notwithstanding, it can be assumed that by his planning and subsequent actions on that fateful day, it appears that he was aware they would have resulted in the likely death of the victim.

[39] Semasa perbuatan merompak tersebut berlaku pergelutan yang menyebabkan OKT bertindak mencekik leher si mati. Perbuatan OKT mencekik si mati beberapa kali dan diselangi dengan beberapa kali memeriksa nadi atau nafas OKT bagi memastikan si mati telah mati menunjukkan niat OKT untuk membunuh si mati. OKT tahu akibat dari perbuatan mencekik leher si mati tersebut akan mendatangkan bencana tubuh yang boleh menyebabkan kematian si mati. Pada pandangan mahkamah, orang yang tidak waras tidak akan memeriksa nadi atau nafas orang yang dicekiknya. Orang yang tidak waras tidak akan membuat ujian dengan cara mengangkat tangan si mati dan melepaskannya bagi memastikan si mati benar-benar telah mati.

[40] OKT juga cuba untuk menyembunyikan perbuatannya itu. OKT telah meminta SP5 membantunya membungkus mayat si mati untuk membuangnya dengan menggunakan kereta si mati. Perbuatan cuba menyembunyikan bukti kesalahan menunjukkan OKT sedar akan kesalahannya. Pada pandangan mahkamah, orang yang tidak waras tidak akan mengambil langkah untuk menyembunyikan perbuatannya.

[41] Akhirnya keterangan berkaitan perbuatan OKT melarikan diri apabila bertembung dan ditegur SP4, meminta tolong SP6 menghantarnya ke stesen bas di Medan Gopeng untuk melarikan diri ke KL Sentral menaiki bas dan seterusnya ke stesen Pudu untuk ke Tanjung Malim menunjukkan OKT berusaha untuk mengelakkan diri dari dikesan. Perbuatan OKT tersebut menunjukkan adanya rasa bersalah yang mana pada pandangan mahkamah tidak akan dilakukan oleh orang yang tidak waras.

[42] Selain itu, pihak pembelaan cuba membuktikan OKT tidak waras dengan mengemukakan pernyataan OKT melalui eksibit D84 serta keterangan dari saksi pendakwaan, SP5 dan SP6. Peguam OKT berhujah bahawa tindakan OKT yang telah dengan selambanya balik ke rumah semasa rakan-rakannya berbuka puasa dan berbual serta berjenaka macam biasa seolah-olah tidak ada apa yang berlaku menunjukkan OKT tidak tahu apa yang telah dilakukannya. Selain itu OKT turut mengadakan seks dengan mayat si mati menunjukkan OKT ada masalah mental kerana orang yang waras tidak akan bertindak sedemikian.

[43] Setelah meneliti dan menimbang hujahan pihak pembelaan serta keterangan SD1 berkait dengan hal berkenaan, adalah didapati bahawa kelakuan OKT selepas kejadian tragis tersebut bukanlah boleh dikategorikan sebagai kelakuan orang yang tidak waras. Tidak ada sebarang keterangan yang dikemukakan pihak pembelaan yang boleh meyakinkan mahkamah untuk menerima hujahan tersebut. Sebaliknya keterangan D84 menguatkan lagi fakta yang OKT sedar dan tahu akan perbuatan salahnya pada masa kesalahan dilakukan.

[44] Begitu juga dengan perlakuan seksual OKT pada hari kejadian. Perbuatan melancap apabila hanya terangsang dengan seluar dalam milik si mati dan

mengadakan hubungan seks dengan mayat si mati tidak dibuktikan sebagai perlakuan biasa orang yang tidak waras. Perbuatan tersebut hanyalah menggambarkan nafsu buas yang tidak dapat dikawal oleh OKT semata-mata dan bukannya suatu yang luar biasa yang hanya dilakukan oleh orang yang tidak waras.

[36] We were in entire agreement with the above reasoning of the learned trial judge. The whole conduct of the appellant on the day of the incident, from the time he broke into the deceased's house up until his elaborate attempt to clear up the evidence and escape, were patently inconsistent with acts of someone who was mentally unsound and incapable of knowing the nature and consequences of his or her acts. The appellant obviously knew that by breaking into the deceased's house and stealing her valuables, he was committing criminal acts and as such, he was prepared to silence her from exposing his crime. That was his motive. He obviously knew that by strangling her, he would silence her and ensure that his crime would not be exposed. In the midst of strangling her, he even had the presence of mind to check her heart beat and hand movement to make sure that she really was dead. He even came back later and stole more of her belongings and again had the presence of mind to take away a copy of her police report made after his previous break-in. Finally, by his attempt at disposing off the dead body and then running away after being caught red-handed carrying the dead body in a rolled up mattress by the security guards, he obviously knew what he did was contrary to law. Under such circumstances, the fact that he was diagnosed to be suffering from a certain mental illness coupled with histories of slow learning ability, strange behaviors and depressive modes would not afford sufficient reasons to invalidate his apparently normal mental capacity at the time of committing the crime.

[37] Though he had a medically recognised mental illness known as 'bipolar disorder', we find that his conduct at all material times clearly defied the conduct of that of an insane person. On the contrary, it was consistent with the conduct of an intelligent person with a clear presence of mind. Worse, it was consistent with the conduct and mind of a hardened criminal who is prepared to kill to conceal his crime. Hence, we were satisfied on the totality of the evidence that at the time of committing the offence, the appellant was not labouring under any form of unsoundness of mind and he knew that the nature of what he did was against the law. It was in fact a pre-meditated murder.

THE CONCLUSION

[38] Having considered the evidence before us in totality, we are satisfied that the learned trial judge had not committed any error in fact or in law that warrants our intervention. We find that the conviction is safe and well

supported by the evidence. We hereby dismiss the appeal and affirm the conviction and sentence against the appellant handed down by the learned trial judge.

Appeal dismissed. Conviction and sentence affirmed.

Reported by Ashok Kumar